Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States

Rey Carmona Sierra, Petitioner
v.
State of California, Respondent

On Petition for Writ of Certiorari
To the California Court of Appeal,
Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May law enforcement officers enter a private residence pursuant to the consent of a non-occupant guest?

2. Whether officers must obtain facts from the person who purports to give consent, before entering a residence, sufficient to establish an objectively reasonable belief that the consenting party has authority to permit entry.

3. Whether consent to search may be implied by silence once officers make entry pursuant to the consent of a non-occupant guest.

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PETITION

Petitioner Rey Carmona Sierra respectfully prays that a writ of certiorari issue to review the decision of the California Court of Appeal, Second Appellate District, Division Six, affirming his conviction and the denial of his motion to suppress evidence pursuant to the Fourth Amendment to the United States Constitution.

LIST OF PARTIES

The parties are as they appear in the caption.

OPINION BELOW

The opinion of the California Court of Appeal, Second Appellate District, Division Six, is not published. A copy is attached as Appendix C. The California Supreme Court's order denying review on January 3, 2002 is attached as Appendix A. The judgment and order imposing sentence of the Superior Court of the State of California, County of Ventura, is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257(a). The California Court of Appeal, Second District, Division Six, filed its opinion on October 15, 2002. The California Supreme Court filed its order denying review on January 3, 2002.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATE STATUTES INVOLVED

California Penal Code section 1538.5. (The text is set forth in its entirety in Appendix D, pursuant to *Rules of the Supreme Court of the United States*, Rule 14 subdivision (f).)

STATEMENT OF THE CASE

Petitioner, Rey Carmona Sierra, was charged with possession of a controlled substance and under the influence of a controlled substance. Both crimes allegedly occurred on May 20, 2000. *Clerk's Transcript* "CT" 56.

At the preliminary hearing, Sierra moved to suppress all evidence against him under *California Penal Code* Section 1538.5, on the grounds that the arresting

officers entered his residence without consent from a person without actual or apparent authority to give consent. CT 6-11; 58-64. His motion was denied:

> I think that all is required under *Rodriguez* is some reasonableness. Their belief, if there is no reasonableness in their belief, no reasonableness that they have this authority, then they might have to inquire, but I don't think they have to go to that point if they have some reason to believe that the person who is there and giving the authority has the authority to do so. I think that can be inferred frmo the conduct of Mr. Diaz as he came to the door and let them in, so the motion is denied. CT 51.

Sierra renewed his motion before the trial judge, and again the motion was denied. CT 42-53, 69.

Sierra then pled no contest to possession of a controlled substance. Sentence was suspended, Sierra was placed on probation, and he filed a timely notice of appeal challenging the court's denial of his motion to suppress. CT 70-77, 91, 92.

HOW THE FEDERAL QUESTION WAS PRESENTED BELOW

Sierra moved the trial court to suppress evidence pursuant to the Fourth Amendment of the Federal Constitution, according to the procedure provided for by state law in *California Penal Code* section 1538.5. CT 6-11, 42-53, 58-64, 69.

In ruling on Sierra's motion to suppress, the trial court received testimony from the Santa Maria police officers who had searched his apartment. CT 17-41. When the trial court denied his motion, Sierra pled guilty to possession of a controlled substance.

Sierra appealed his sentence to the California Court of Appeal, Second District, Division Six, claiming the search of his apartment and seizure of contraband violated the Fourth Amendment to the United States Constitution. The Court of Appeal affirmed the trial court's ruling, and thus Sierra's conviction, on October 15, 2001. Sierra petitioned the California Supreme Court for review, and review was denied in an order filed January 3, 2002.

REASONS FOR GRANTING THE WRIT

The California Court of Appeal, Second District, Division Six has decided incorrectly an important question of federal law that should be resolved by this Court.

Specifically, the California Court of Appeal has concluded that the doctrine of apparent authority permits officers to enter a private residence without warrant, for the purpose of a criminal investigation, with permission of a non-occupant guest from whom they obtained no facts to establish joint occupancy or common authority. Further, the Court has ruled that Sierra's silence and failure to identify himself provided the officers with implied consent to search the apartment once they had entered. This ruling is not consistent with the requirements of the Fourth Amendment: "...[W]here the validity of a search rests on consent" the State cannot meet its burden "by showing a mere submission to a claim of lawful authority." *Florida v. Royer*, 460 U.S. 491, 497 (1983).

The California Supreme Court was provided the opportunity to review petitioner's federal constitutional challenge and declined to do so.

Because a person's expectation of privacy is greatest in his own residence (*Payton v. New York*, 445 U.S. 573 (1980), and because the California courts have disregarded this basic Fourth Amendment principle here, petitioner respectfully requests that this Court consider the issue in his case.

I. THE OFFICERS DID NOT HAVE VALID CONSENT FROM THE GUEST, DIAZ, OR FROM PETITIONER TO ENTER HIS APARTMENT.

The prosecution attempted to justify the officers' warrantless search with the following facts: The police knocked on Sierra's apartment door. Morales Diaz, who had just arrived, answered the door. Police explained their purpose, and asked to speak to petitioner or his brother, Urbano Sierra. Diaz stated that both were inside, and told the officers that "if they needed to speak with [petitioner or Urbano Sierra] they could come inside." *Reporter's Transcript* "RT", 7. Although the door was partially open already, the officers were unable to confirm petitioner's or Urbano Sierra's location--other than Diaz's acknowledgment that they were "inside"--prior to their entry. RT 13.

Absent a search warrant, entry into a private residence is justified only by exigent circumstances or lawful consent. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *Welsh v. Wisconsin*, 466 U.S. 740, 748-749 (1984). Consent both to enter a residence and to search for contraband can be given *only* in one of three ways: 1) by defendant, as to property he occupies as a resident, lessee, or co-tenant; 2) by a third party, such as a spouse, parent, or co-tenant, with whom defendant shares joint control and access over

the premises and property searched; or 3) by someone who credibly claims to be one of the above persons. *Illinois v. Rodriguez*, supra, 497 U.S. at 181. On *rare* occasion defendant's conduct may be sufficiently unambiguous as to imply consent. *United States v. Griffin*, 530 F.2d 739, 743 (7th Cir.1976). *United States v. Shaibu*, 920 F.2d 1423, 1426 (9th Cir. 1990).

Here, the prosecution did not argue that Sierra actually authorized the entry. Instead, the prosecution claimed that Diaz "could" have been a co-tenant or resident, and thus the officers were justified in relying on the doctrine of apparent authority. CT 46-48. Additionally, the prosecution argued that petitioner and/or Urbano Sierra ratified the entry by failing to object once the officers were inside. RT 13.

Specifically, at the preliminary hearing, the prosecution claimed that consent was implicit because neither petitioner nor his brother objected once the officers entered the apartment:

> They relied upon this man's invitation to see the person for whom they were looking for who apparently was in the room at the time they merely walked in. They can't be charged with having to determine beforehand whether or not this man has actual authority to invite somebody into the front door through the front

door....At this point is when it should have been expressed no, you cannot come in. No, I don't want you in here, or something to that effect. CT 47.

The prosecution argued that the officers "are not charged with demanding and making sure that somebody who invites them into a residence has the capacity, the legal capacity to do that." CT 46.

At the subsequent (second) suppression hearing before the trial court, the prosecution again argued that Diaz's consent was ratified by petitioner's and his brother's failure to object to the officers' entry: "It makes common sense, if somebody else opens the door and you're sitting there and you make no effort to do anything, you impliedly ratify what's going on." RT 13.

In fact, the officers' burden of proof *does* require that they determine, based on objectively reasonable facts and before they enter a residence, whether the person from whom consent is sought possesses joint control or dominion over the area to be searched and thus has authority to give consent. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *People v. Shandloff*, 170 Cal.App.3d 372 (1985). The prosecution holds the heaviest burden to justify a warrantless entry when consent to enter is implied or inferred. *United States v. Impink*, 728 F.2d 1228, 1232 (9th Cir. 1984).

Whether the government has met its burden is a stringent, not perfunctory, analysis:

> The government must prove that consent was given. It must show that there was no duress or coercion, express or implied. The consent must be 'unequivocal and specific' and 'freely and intelligently given.' There must be convincing evidence that defendant has waived his rights. There must be clear and positive testimony. '"Courts indulge every reasonable presumption against waiver" of fundamental constitutional rights.' Coercion is implicit in situations where consent is obtained under color of badge, and the government must show that there was no coercion in fact. *United States v. Shaibu, supra,* 920 F.2d 1423, 1426.

The prosecution here did not meet that burden of proof. It merely demonstrated that the facts known to the officers *might* have been consistent with a theory that Diaz was a joint occupant of the apartment, and that appellant and Urbano Sierra failed to object to the officers' entry.

A. Actual Authority Was Never Asserted or Proven.

Issues regarding actual authority most often arise in cases where a spouse, co-tenant, resident parent, or resident teenage child gives consent to search portions of the home occupied exclusively by others, or closed containers located therein. California Courts have held that teenage children living in a residence may allow police to enter, but may not consent to search of anther family member's secured container. *See, e.g., People v. Hoxter,* 75 Cal.App.4th 406 (1999). It is also clear than an owner may allow a search of areas occupied by his guest, although not of his guest's personal, secured belongings (*see, e.g., United States v. Fultz, supra,* 146 F.3d at 1105-1106), and a wife may authorize consent to search areas of a home occupied by her husband (*see, e.g., United States v. Sealey,* 830 F.2d 102 (7th Cir.1987).

In contrast, a casual visitor has no right to be inside the apartment except with the tenant's invitation, and no right to enter alone, and thus correspondingly he has no Fourth Amendment expectation of privacy in his host's home. Even an overnight guest holds no legal right to grant or deny access to others. *Minnesota v. Olson,* 495 U.S. 91, 99 (1990) ["The point is that hosts will more likely than not respect the privacy of their guests, who are en-

titled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household.]." It necessarily must be, then, that a person who has no right to grant or deny access (an overnight guest), or who has not even a Fourth Amendment privacy interest (a casual guest), has no right to offer consent to enter another's home.

Recognizing this, the prosecution did not argue that Diaz was a person in control of the premises, or that he was a person with the right to "mutual use of the property...having joint access or control for most purposes." *Illinois v. Rodriguez, supra,* 497 U.S. at 181. Similarly, at no time did Diaz claim to be an occupant. He simply answered the door, and offered to let the officers in to find appellant and his brother. Thus here, the prosecution never advanced the theory that consent by someone with actual authority justified the initial entry. CT 45-47; RT 13.

B. The Unlawful Entry Cannot Be Rescued by the Doctrine of Apparent Authority.

Third-party consent, or consent by someone other than defendant, is lawful only when granted by a person who had "common authority" over the premises and the things sought to be searched therein. *United States v.*

Matlock, 415 U.S. 164, 171 (1974); *Chapman v. United States*, 365 U.S. 610, 616-618 (1961). "Common authority" means "`mutual use of the property by persons generally having joint access or control for most purposes....'" *Illinois v. Rodriguez*, supra, 497 U.S. at 181, citing *Matlock, supra*, 415 U.S. at 171.

Where the person giving consent does not actually possess "common authority" over the premises, the search will still be valid if, and *only* if, the officers reasonably and in good faith believed the person possessed such "common authority" at the time consent was given:

> The apparent authority doctrine, however, validates a search only where the search would be valid if the facts believed the by the officer were true. *United States v. Fultz*, 146 F.3d 1102, 1106 (9th Cir.1998). *See also United States v. Leegreen*, 523 F.2d 968, 971 (9th Cir. 1975).

The doctrine of apparent authority does not allow officers to fail to inquire where facts are ambiguous; instead, it excuses an error of fact that, in hindsight, proves wrong. *United States v. Fultz, supra,* 146 F.3d at 1106. The doctrine provides a means of correcting an officer's reasonable mistake of fact; it does not fill in the gaps in testimony where an officer did not investigate--and thus

cannot explain--who the consenting party was in relation to the property entered. In short, before entering a residence, it is the officers' duty, burden, and obligation to obtain sufficient information about the residence and the consenting party to conclude that the person offering consent is authorized to do so. *Illinois v. Rodriguez, supra,* 497 U.S. 177, 188-189; *United States v. Fultz, supra,* 146 F.3d at 1106.

Both the trial court and the Court of Appeal here concluded that Diaz "might" theoretically have been an occupant, and that his statement "I just got here" did not necessarily preclude possible occupancy. CT 49. Therefore, there *might* have been a scenario under which Diaz had authority to consent, and thus the police were authorized in accepting consent without further inquiry. CT 49.

In fact the officers knew the names of the apartment residents before they arrived, and had received that information from the female caller located inside the residence. They saw from outside the door that there were fifteen to eighteen Hispanic males inside the apartment. They also knew that Diaz had "just arrived," and that he disclaimed knowledge of the activities inside. CT 20-23, 32-33. The officers informed Diaz that they were looking for appellant and Urbano Sierra, and Diaz offered to let the officers in to speak with them. CT 21-23, 32-33.

Under the circumstances, the officers were obligated by law to inquire further. *Illinois v. Rodriguez, supra,* 497 U.S. 177, 188-189; *United States v. Matlock,* 415 U.S.164 (1974). The officers here did not investigate Diaz's authority to consent; they simply secured his invitation to enter for the purpose of talking to appellant, and walked through the open door. Apparent authority does not mean Diaz appeared to possibly have authority. It means the officers asked, Diaz in turn confirmed, and the officers thereon reasonably believed, that Diaz was a co-occupant of the premises.

To find the entry lawful here would improperly shift the burden of proof regarding consent from the officer to the resident, owner, or occupant. A person with no privacy interest in the premises could waive the constitutional rights of owners and occupants by failing voluntarily to disclaim common authority. More importantly, such a ruling would revise the current law of search and seizure by permitting officers to substantially infringe upon the most basic of constitutional rights: the right to privacy inside one's own home. *Mapp v. Ohio* (1961) 367 U.S. 643. That result should not be allowed.

C. Because the Initial Entry Was Unlawful, the Officers Unlawfully Searched the Residence Once Inside.

Because the initial entry was unlawful, the officers had no authority to proceed with a search once inside, including the search of the living room sofa. Petitioner was under no obligation to affirmatively resist, to identify himself, or to otherwise respond to the officers. In fact, his failure to identify himself implicitly expressed his desire not to confront, respond to, or deal with the officers in any capacity. A person who is not lawfully seized has no obligation to respond to an officer, or even listen to his or her questions. *Terry v. Ohio*, 382 U.S. 1, 32-33 (1968); *United States v. Mendenhall*, 446 U.S. 544 (1980); *United States v. Shaibu, supra,* 920 F.2d at 1427-1428.

II. THE OFFICERS DID NOT HAVE CONSENT TO SEARCH THE WALLET.

The wallet located in the couch constituted a separate closed container for which the officers would have needed separate, specific consent to search. *United States v. Welch*, 4 F.3d 761, 764 (9th Cir.1993); *United States v. Karo* (1984) 468 U.S. 705, 725-727; *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980). A person who holds a reasonable expectation of privacy in a container holding personal items--such as a duffle bag, luggage, or purse--does not

surrender his expectation of privacy by storing the container in a place not exclusively controlled by him:

> A person has an expectation of privacy in his or her private, closed containers. [Citation.] A person does not forfeit that expectation of privacy merely because the container is located in a place that is not controlled exclusively by the container's owner. [Citation.] Thus, in *Welch*, we held that a person retained her expectations of privacy in her purse even though the purse was in a trunk of a car over which she and some else both had control." (*United States v. Fultz*, 146 F.3d 1102, 1105 (9th Cir.1998), citing *United States v. Welch*, 4 F.3d 761, 764 (9th Cir.1993)

Petitioner maintained a separate expectation of privacy in the wallet, for which the prosecution bore the burden of establishing consent to search. (*Ibid.*)

There was no express consent by anyone to search the wallet. Even if Diaz's consent to enter had been authorized, search of the wallet would not have been included in that consent. In *People v. Fultz, supra,* permis-

sion by a third party homeowner to search a residence did not include permission to search the contents of a cardboard box in the garage containing defendant's personal belongings:

> Fultz has a reasonable expectation that his closed cardboard boxes in Kassedyne's garage would remain private. Fultz did not share use of, access to, or control over these boxes with Kassedyne, and Kassedyne informed the officers who searched Fultz's closed boxes that the boxes were not hers but his. Accordingly, Kassedyne has neither actual nor apparent authority to consent to the search of Fultz's boxes. *Id.* at 1106.

Even people with actual common authority and mutual use of certain property do not have authority to allow the search of private, closed containers located on that property. *United States v. Welch, supra,* 4 F.3d 761 is instructive on that point.

In that case, defendant Welch's purse was searched for counterfeit twenty-dollar bills after her co-defendant, McGee, consented to a search of the rental car in which the purse was located. Defendant was not under arrest when the search occurred. *Id.* at 762-763. Relying on

Florida v. Jimino, 500 U.S. 248 (1991), the trial judge concluded that McGee's consent included consent to search the purse. McGee's consent was not limited, McGee knew the officers were looking for counterfeit money, and the purse was a likely place to find the items sought. *Id.* at 763.

The Ninth Circuit concluded that the trial judge had analyzed the wrong question. The issue was McGee's authority to consent, not the scope of his consent:

> Unfortunately, the magistrate judge examined the wrong question. The dispositive issue in this case in not what areas of the car McGee may have intended his consent to encompass, whether he intended to authorize a search of any of the car's contents, or even what constitutes an objectively reasonable interpretation of his statements to the others. Rather the issue is whether McGee had the authority, either actual or apparent, to give effective consent to the search of his companion's purse. *Id.* at 764.

Having properly framed the question on appeal, the Ninth Circuit found that McGee could lawfully consent to search of the rental car because he and Welch had joint access to it. By sharing access with McGee, Welch partially relin-

quished her expectation of privacy in the vehicle itself. *Id.* at 764.

The court characterized the search of Welch's purse, however, as "another matter entirely." The purse was a closed container within the car to which Welch had an independent expectation of privacy:

> The fact that she [Welch] had a limited expectation of privacy in the car by virtue of her sharing arrangement with McGee does not mean that she had similarly limited privacy expectations in items within the car which are independently the subject of such expectations. The shared control of "host" property does not serve to forfeit the expectation of privacy in containers within that property. *Id.*, citing *United States v. Karo, supra,* 468 U.S. at 725-727.

The Ninth Circuit found nothing inherent in "the circumstances of McGee's exchange with the security officers that would have caused them reasonably to believe that he had actual or express authority to consent to a search of Welch's purse." At the least, the officers were obligated to inquire further before opening the purse they discovered during the search. *Id.* at 765.

The question that arises here is whether Sierra's

failure to acknowledge ownership of the wallet, coupled with his conduct at the time of the search, constituted an implied consent to search the wallet. One of the officers had seen someone place an item--which turned out to be the wallet--under a sofa cushion, in an effort to maintain privacy. The officers were not shown the wallet, nor were they directed to it intentionally. Instead, they removed it from inside the sofa where it had been placed away from their inspection.

In *United States v. Burnette*, 698 F.2d 1038 (9th Cir.1998), a passenger in a vehicle stopped following a robbery spontaneously stated "I just found this purse" when contacted by the detaining officer. When subsequently asked to produce identification, she indicated that her wallet was in "her purse." She also removed from the purse a traffic court summons bearing her name. When she tried to remove her wallet from the purse, she first opened and then quickly closed the purse, then turned away from the detaining officer. The officer, fearing the woman was about to remove a weapon, circled around the woman to see what she was doing. At that time, he observed that the purse was stuffed with cash. *United States v. Burnette supra,* 689 F.2d at 1038. The purse was seized and subsequently searched more thoroughly at the police station. *Ibid.*

The Ninth Circuit concluded that the woman's con-

duct indicated her intent to maintain privacy in the contents of her purse:

> Although Lynette initially disclaimed ownership of the purse, her subsequent conduct during the confrontation with Officer Williamson strongly indicated her intent to retain a 'reasonable expectation of privacy in the purse.' At one point during the confrontation, Lynette referred to the purse as 'my purse.' Much more compelling, however, was Lynette's behavior while trying to comply with Officer Williamson's request for photographic identification. While trying to retrieve her wallet, Lynette took all possible precautions to retain her privacy in the contents of the purse.... She continued to hold the purse until it was physically removed from her possession.... *United States v. Burnette supra,* 689 F.2d at 1048.

The Court concluded, then, that the passenger intended to retain an expectation of privacy in the purse, and that she was thus entitled to the rights and protection conferred by the Fourth Amendment. *Ibid.*

Since the officers here entered Sierra's apartment with the appearance of authority to do so, Sierra had no

obligation to identify himself, or affirmatively to resist the search. The officers bore the burden of obtaining consent, which they did not and could not do, because appellant chose not identify himself. Clearly the location of the wallet under the couch cushion expressed Sierra's desire that his wallet contents remain private. His silence, therefore, expressed not an implicit consent but a desire not to cooperate with the officer. *United States v. Shaibu*, 920 F.2d 1423, 1426 (9th Cir.1990). He had every right to elect not to answer questions under the circumstances.

III. CONCLUSION.

Petitioner respectfully requests this Court to grant his petition for writ of certiorari, review his case for violation of the Fourth Amendment of the United States Constitution, and reverse the holding of the California Court of Appeal.

Dated: March 31, 2002

Respectfully submitted,

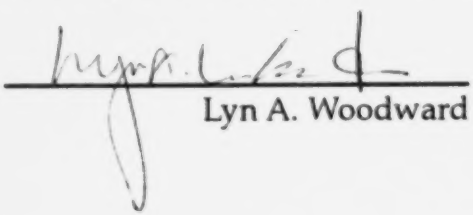
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CERTIFICATE OF COMPLIANCE

This original brief is presented in proportionately-spaced 11.5 point Roman typeface (Book Antiqua). The lines are spaced at least 2 points from one another. There are no footnotes. Quotes greater than 50 words in length are indented. The word count for this brief is 4,598 words, and 23,692 charcters (without spaces), including tables, but excluding this certificate.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 31st day of March, 2002, at Pacific Grove, California.



Lyn A. Woodward

Court of Appeal, Second Appellate District,
Division Six -No. B144455
S102088

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

En Banc

SUPREME COURT
FILED
JAN - 3 2002
Frederisk K. Ohlirich Clerk
Deputy

THE PEOPLE, Plaintiff and Respondent,

v.

REY CARMONA SIERRA, Defendant and Appellant.

Petition for Review Denied.

APPENDIX A-1

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

F [initialed]
Doc [initialed]
Stat __
Prob __
IR __
Conf. __
Ref. [initialed]

Dated and Entered: 08-07-00 Time: 9:00 am
Honorable: Zel Canter
Deputy Clerk: Swack, Susan Dept: SM1
Deputy Sheriff: ~~Sierra, Paul~~ T. Southwick
Court Reporter: Cianciarulo, Mary Case No: 1023606
Interpreter: Doralisa Smart

PEOPLE V. STATE OF CALIFORNIA vs. Rey Carmona Sierra
Present:

☑ Dist. Atty: C. Biely
☑ Deft's Atty: Kevin Carey
☑ Prob. Officer: D. Mitchell
☑ Defendant: ☐ Not Present

Nature of Proceedings: Motion: Suppress -1538.5PC / R&S
Information Filed: 6-26-00
Charges: Count 1 FHS11350(a) Count 2 MHS11550(a)

☑ Time for trail waived through 9-30-00. Times estimate for trial _____.
☐ Set on Criminal Trial Setting Calendar_____at ☐ a.m. ☐ p.m. in Dept. ____
☑ Continued to 9-11-00 at at 8:30 ☐ a.m. ☐ p..m. in Dept. SM1 for RIS; PrePlea
☑ Continued upon the request of ☑ Court ☐ The People ☐ Deft ☐ Stip

☑ Trail calendar of 8-14-00 vacated ✓ Referred to Probation for PrePlea Report.

☐ Defendant advised of Constitutional rights and waived all such legal rights.

☐ Defendant withdrew plea(s) of not guilty and plead ☐ guilty ☐ nolo contndere to _____

☐ Defendant admits Enhancements Allegations

☐ Waiver of Constitutional Rights Plea of Guilty/No contest signed & filed

☐ Time waived for pronouncement of judgment

☐ Defendant waived formal arraignment for judgment, there being no legal cause why judgment should not now be pronounced:

☐ Probation granted. Order signed and filed. ☐ Bail exonerated. ☐ Probation denied.

☐ Defendant to serve ___ days in county jail, ☐ commencing ☐ forthwith _____

☐ Credit for time served ___ days, good/work time___ days, total ___ days

☐ Defendant may apply for ☐ S.W.A.P. ☐ Electronic Monitoring ☐ Work Furlough

☐ Remaining counts dismissed ☐ Enhancements/Special allegations ☐ dismissed ☐ stricken

☐ Remaining counts to be dismissed at the time of the probation hearing

☐ Defendant made application for probation. ☐ Referred to Probation for _____

☐ Defendant failed to appear ☐ O.R. ☐ Bail revoked ☐ Forfeited

APPENDIX B-2

☐ Warrant to issue, serve day or night ☐ No bail Bail revoked ☐ Bail fixed at $ ___

☐ Warrant stayed. Court found sufficient excuse may exist for defendant's failure to appear

☐ Defendant returned on warrant ☐ Warrant re-called O.R./Bail reinstated

☐ I certify that the requirements of CRC 895 were met

☑ Arresting Agency SMPD Defendant's date of birth 6-27-77

☑ Court further ordered: Defendant's 1538.5 P.C. Motion denied.

☐ Defendant released on ☐ O.R. ☐ Bail

☑ Defendant remanded to custody of Sheriff ☐ Bail fixed $ _____

☐ Continued to page 2

GARY M. BLAIR, EXCEUTIVE OFFICER
by: [SIGNATURE], Deputy

SC-3402 (Revised March 7, 2000)

Criminal Minute Order
Readiness & Settlement

00069

APPENDIX B-3

Superior Court of the State of California
For the County of
Santa Barbara
Santa Barbara Superior Court
Criminal Division
La Corte Superior del estado de California
Para El Condado de Santa Barbara
Division Crimila

FILED
SANTA BARBARA
SUPERIOR COURT
SEPT 11 2000
Gary M. Blair
Executive Officer
/S Susan Swack
By: Susan Swack, Deputy

No. 1023606

The People of the State of California El Pueblo del Estado de California,

SUPERIOR COURT SENTENCING & PROBATION ORDER
Sentencia de Probacion $ de la Corte Superior

Plaintiff (Demandante),
No. 1023606

Rey Carmona Sierra,
Defendant (Acusado),
Defendant (Acusado)

the defendant, having been convicted ☑ by plea ☐ by conditional plea ☐ by jury ☐ by Court of the crime(s) of:

APPENDIX B-4

El acusado al haber sido convicto ( ) por declaracion ( ) por acuerdo condicional ( ) por jurado (por el juez, del/ de los delito(s) de:

CT 1: 11350 (a) HS

On (el) ___ an appearing in open Court this date (y presente en Corte publica en esta fecha),

☐ The Court having read and considered the probation report (La Corte, al haber leido I considerado el informe de probacion).

☐ The defendant having waived a probation report (El acusado habiendo renunciado al informe de probacion).

THE COURT NOW ORDERS THAT: (la Corte Ahora Ordena Que):

☒ the pronouncement of judgment is suspended and the defendant is granted probation for 3 years on the below listed terms and conditions: El pronunciamento del fallo queda suspendido y al acusado se le otorga probacion por_____ anos con los terminos y condiciones que a continuacion se mencionan:

☐ the defendant is committed to: ☐ State Prison ☐ County Jail for ___; and that the execution of said judgment is suspended and the defendant is granted probation for ___ years on the following terms and conditions: El acusado queda confinado a: ( ) Prison Estatal ( )

Carcel de Condado por ___; y la ejecucion de dicho fallo queda suspendida y al acusado se le ortoga probacion por ___ anos bajo los siguientes terminos y condiciones:

☒ 1. Serve forthwith 170 days in the Santa Barbara County Jail, with credit for time served of 114 actual days plus 56 days good time/work time for a total of 170 days. Sheriff's Work Alternative Program/Work Furlough/ Electronic Monitoring approved. Must apply before ___. Custody to begin on or before ___ on ___. Cumplir ___ periodos de tiempo en la Carcel del Contado de Santa Barbara, con credito por tiempo ya cumplido de ___ dias hechos, mas ___ por buena conducta y trabajo, por un toyal de ___ dias. Programa del Sherif Alternativo de Trabajo/Licencia para trabajo/monitor electronico aprovada/o. Tiene que solictiar antes de ___. Custodia empieza antes o las ___ el dia ___.

☒ 3. Pay fines totaling $500.00, including penalty assessments, ? as directed by Probation, in monthly payments of not less than $25.00 commencing 60 days after release through the Treasurer/Tax Collector of the County of Santa Barbara. Fines may be worked off by completing 80 of work in the Community Service Work Program. Pagar multas por un total de $ ___, incluyendo recargos en abonos mensuales de no menos de $ ___ comenzando ___, y pagados a traves del Tesorero/Recaudador de Impuestos del Condado de Santa Barbara. La multa se

puede pagar completando ___ horas trabajadas con el Progama de Trabajo de Servicios a la Comunidad.

☐ 4. Pay restitution in the amount of $ ___ to ___, $ ___ to ___, and $ ___ to ___. (You have a right to a judicial determination of the amount pursuant to statute 1202.4 (f) (1) PC.) Pagar restiticion de $ ___ a ___, $ ___ a ___, y $ ___ a ___. (Usted tiene el derecho de tener una audencia sobre la cantidad pertienente al codio 1202.4 (f) (1) PC.)

☐ 5. Pay restitution in an amount to be determined. Payment will be made as directed by the Probation Officer. (You have a right to a judicial determination of the amount pursuant to statute 1202.4 (f) (1) PC.) Pagar restitucion en la cantidad que sea determinada. Hacer pagos como sea indicado por el Oficial de Probacion, (Usted tiene el derecho de tener una audencia sobre la cantidad pertienente al codio 1202.4 (f) (1) PC.)

☒ 6. Pay booking fees in the amount of ? $119.62, payable to SMPD. Paga la tarifa de registro en la carcel en la cantidad de { } $ ___ { } a ser pagados a ___.

☒ 7. Pay the following fines as directed by the P.O., through the Treasurer/Tax Collector of the County of Santa Barbara. Pague las siguentes multas como sea ordenado por el Oficial de Probacion, al Tesorero/ Recaudador de Impuestos del Condado de Santa Barbara:

☒ $ 200.00 Restitution fine pursuant to Section 1202.4. Pague $ ___ al Restitution Fund de acuerdo a la seccion

1202.4 P.C.

☒ $ 135.00 pursuant to 11372.5 H&S, includes penalty assessment. $ ___ en conformidad con ___.

☒ $ 405.00 pursuant to 11372.5 H&S, includes penalty assessment. $ ___ en conformidad con ___.

☒ 9.Obey all laws and not associate with known criminals. Obedezca todas las leyes y no se reuna con criminos conocidos.

☒ 10. Report in person to the Probation Officer within 72 hours after sentencing or release from custody, whichever is sooner. Report at the times, in the place, and in the manner directed by the Probacion Officer. If you are deported, follow the reporting and payment instructions on the back page of this order. Preeentese personalmente con so Oficial de Probacion dentro de un plazo de 72 horas despues de ser sentenciado o de salir de la carcel, cualquier que sea mas pronto. Presetese en qualquier momento y en tal manera como haya indicado el Oficial de Probacion. Si usted es deportado, siga las instrucciones que se encuentran en la pagina de atras para reportarse y para pagar las multas.

CL-338 Revised 03-17-97

APPENDIX B-8

☒ 11. Follow all orders of Probation Officer, including taking any recommended therapies at the defendant's expense. Cumpla con todas las ordenes del Oficial de Probacion, incluyendo tomar cualquier terapia recomendada a costo del acusado.

☒ 12. Maintain residence approved by Probation and keep the P.O. advised of place of residence and employment. Mantenga una residencia aprobada por el Oficial de Probacion y mantega informado al Oficial de Probacion de su lugar se residenciay empleo.

☒ 13. Not change place of residence, nor leave the County of Santa Barbara or the State of California without the permission of the Probation Officer. No cambie de lugar de residencia ni salga del condado de Santa Barbara ni del Estado de California sin el permiso del Oficial de Probacion.

☐ 14. Seek and maintain regular employment ☐ when not a full-time student. Busque y mantenga emplei estable cuando no sea un estudiante de tiempo completo.

☐ 15. Maintain a standard of appearance that will not impede employment. Mantenga bien suy aparienca personal para que no impida empleo.

☒ 16. Not own, possess, or have under custody & control ☒ any firearm ☐ any weapon, including firearms. No sea propietario, ni tenga en su posesion ni

bajo su custodia o contol [ ] ningun arma de fuego [ ] ningun arma o sin motivo.

☒ 17. Submit person & property to search & seizure at any time of day or night by a peace officer or probation officer with or without warrant & with or without cause. Someta su persona, su propiedad y su vehicula a requisa y decomiso en cualquier momento del dia o de la noche, por agentes de policia o agentes de probacion, con o in orden de requisa, con motivo o sin motivo.

☒ 18. Not associate with known drug users or sellers. No se reuna con personas conocidas como usarios o vendedores de drogas.

☐ 19. Not become an undercover agent or confidentail operator for any law enforcement agency. No se haga agente secreto o operador confidentia; de ninguna agencia de policia.

☒ 20. Do not use or possess any drugs or narcotics controlled by law, unless prescribed for you by a licensed physician, and then only in the amounts prescribed. No usar ni poseer ninguna droga ni ninunn narcotico controlado por la ley a menos que haya sido recetado como trata miento por un medico con licencia pero solo en las cantidades recetadas.

☒ 21. Submit to standardized tests to determine illega use of drugs, narcotics & alcohol. Sometase a analisis estandardizados para determinar el uso ilegal de drogas,

narcoticos y alcohol.

☒ 22. Enter and complete an alcohol/drug treatment program ☐ with a waiver of custody credits for time spent in program. Inscribase y complete un programa de internos para el tratamiento del abuso de alcohol/drogas y renunciar los creditos por tiempo servido en el programa.

☒ as directed by the Probation Officer
( ) como sea dirigido por el oficial de Probacion.

☐ immediately upon release from custody.
( ) immediatemente despues que salga de custodia.

☐ 23. Abstain from all alcoholic beverages and stay out of places where they are the chief item of sale. Abstengase de toda bebida alcoholica y mantengase fuera de los lugares donde estas se venden como articolo principal.

☐ 24. Your license to drive is suspended for a period of ___ months pursuant to Section ___ CVC. Su licencia para manejar es revocada por un periodo de ___ anos en conformidad con la seccion ___ del Codigo de Vehiculos de California.

☒ 25. Register pursuant to ☒ 11590 H&S (drugs) ☐ 457.1 PC (arson) and ☐ 290 PC (sex).

☐ 26. Do not associate with children under 14 years of age. No se reuna con menores de 14 anos.

☐ 27. Enter and complete sex offender therapy as directed by the P.O. Do not cease until released by both the therapist and P.O. Inscribase y complete la terapia para los delincuentes sexuales tal como lo haya indicado su Oficial de Probacion. No deje de asistir a la terapia a menos que tanto su terapeuta como su Oficial de Probacion le den de alta.

☐ 28. Pay the cost of any medical exams and/or counseling for the victim, pursuant to Sections 1203.1 g and 1203.1 h PC. Pague el costo de cualesquier examenes medicos y/o de cualquier para la victima, en conformidad con las secciones 1203.1 g y 1203.1 h del Codigo Penal.

☐ 29. Provide specimins of blood and/or saliva as directed, pursuant to ☐ 290.2 P.S. ☐ 1524.1 PC ☐ 1202.1 PC ☐ 1202. 6 PC. De muestras de sangre y de/o saliva como sea ordenado en conformidad con la seccion to ☐ 290.2 P.S. ☐ 1524.1 PC ☐ 1202.1 PC ☐ 1202. 6 PC.

☐ 30. Do not have checking account nor possess any blank checks, No tenga cuenta de cheques ni posea cheques en blanco.

☐ 31. The defendant is not to be considered for County Parole. El acusado no debe ser considerado para libertad condicional del Condado.

☐ 32. Inform any physician that you are a drug addict before being prescribed any medication. Informar a

cualquier medico que usted es adicto a las drogas antes que le receten cualquier medicamento.

☐ 33.

Done in Open Cort On: 9-11-00
Ejecutado en Corte publica el:

Judge of the Superior Court
Juez de la Corte Superior
/s Zel Cantor

I have read and fully understand the above terms and conditions and accept them, and I hereby acknowledge receipt of a copy of this order on Probation and notice of my right to petition for a certificate of rehabilitation and pardon. I further waive ant extradition to the State of California from any jurisdiction in or outside the United States where I may be found and agree that I will not contest any effort to return me to the State of California.

Yo he leido y entiendo completamente los terminos y condiciones mencionadise anteriormente y los acept, y acuso recibo de una copia de esta orden de probacion y del aviso de mi derecho de pedir un certificado de rehabilitacion y perdon. Ademas renuncio extradition el Estado de California de cualquier jurisdiccion dentro o

fuera de los Estados Unidos donde yo me encuentre y convengo en que bo litigare contra las medidas que se tomen para regresarme al Estado de Californa:

/s Rey Sierra

Signature of Probationer

Firma del Acusado en bajo probacion

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,
Plaintiff and Respondent

v.

Rey Carmona Sierra,
Defendant and Appellant.

2d Crim. No. B144455
(Super. Ct. No. 1023606)
(Santa Barbara County)

COURT OF APPEAL - SECOND DIST.
FILED
OCTOBER 15 2001
JOSEPH A. LANE, CLERK
Deputy Clerk

Rey Carmona Sierra appeals a judgment of conviction following his nolo contendere plea to possession of a controlled substance. (Health & Saf. Statute11350, subd. (a).) The trial court granted probation. Appellant contends that the court erred in denying his motion to suppress evidence pursuant to Penal Code section 1538.5. We affirm.

FACTS

The police received an anonymous phone call that cocaine and marijuana were being used at a certain apartment. The tip came from a woman inside the apartment who reported that its "owners" were Rey Carmona and Urbano Sierra. Three officers went to the residence and knocked on the door. It was answered by Morales Diaz. The officers saw 15 to 18 men in the living room. They were drinking beer and two or three were asleep on the floor.

One officer explained that they had information about narcotics use in the apartment. Diaz said he had just arrived and knew nothing about it. The officer asked for Rey or Urbano, and Diaz responded that Rey Sierra was inside and invited the police in the apartment to talk to him. Two officers entered the living room and one remained in the entryway. An officer asked Rey or Urbano to come forward, but no one responded. He advised the group that he had received information about illegal narcotics activity and asked if anyone objected to a search of the apartment or a personal search. No one responded, and five or six men stood up and consented to pat-down searches.

A man was seen putting his hand underneath a sofa cushion. One of the officers reached under the cush

ion and removed a wallet. He asked whom it belonged to, and there was no response. He opened the wallet and found a resident alien card in the name of Rey Sierra and a baggy of cocaine. The officer asked again whom the wallet belonged to and there was no response. Appellant stood up and claimed ownership of the wallet and the cocaine.

Discussion

Consent to Enter

Prior to the preliminary hearing appellant moved to suppress evidence on the ground that the seizure of his wallet violated his right under the Fourth Amendment to be free from unreasonable searches and seizures. (Pen. Code, Section 1538.5). The motion was denied. He renewed his motion prior to trial (id., subd., (I)) and it was again denied.

The trial court found that the officers' belief in Diaz's authority to consent was reasonable. The court noted that there could have been other occupants living in the apartment besides the leaseholders. The large number of individuals in the apartment was not unusual, given the scarcity of rental space in Santa Maria. In addition, there had been no attempt to deny police entry. Although the officers had stated their purpose, Diaz had left the door wide open, allowing them to see the interior of the

apartment. He invited them inside. Appellant's second motion was denied by a different judge on the same grounds.

When reviewing a motion to suppress evidence, "[w]e defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (People v. Glaser (1995) 11 Cal.4th 354, 362.) Appellant argues that the officers lacked consent to enter his apartment because a consenting third party must be a co-tenant. He also contends that the officers were required to determine whether Diaz possessed actual authority because they knew the names of the leaseholders before they arrived.

A warrantless entry by police officers into a residence is presumed to be unreasonable, and a violation of the Fourth Amendment to the United States Constitution. (Payton v. New York (1980) 445 U.S. 573, 585-586.) This prohibition does not apply when the officers have obtained consent to search from a person who possesses authority over the premises/ Consent may also be given by a third party who shares common authority. (U.S. v. Matlock (1974) 415 U.S.164, 170 [person sharing bedroom with defendant had authority to consent to search of pre

mises and bag found in closet].)

Under the doctrine of apparent authority, the consent of an individual who does not possess common authority over the premises may nevertheless be valid if the police reasonably believed they had consent to search. (Illinois v. Rodriguez (1990) 497 U.S> 177, 181 [consent valid where defendant's girlfriend permitted police to enter his apartment to which she had a key]; People v. Jenkins (2000) 22 Cal.4th 900, 971-972 [consent by defendant's sister to seizure of his briefcase found in her home].) We determine whether the officers' reliance on an individual's apparent authority was objectively reasonable. (Illinois at pp. 186-188/) The inquiry is whether the "facts available to the officer at the moment...[would] "warrant a man of reasonable caution in the belief" that the consenting party had authority over the premises' as to which consent is give." (Id. At p. 188.) This is a factual question which is determined by the totality of the circumstances. (Ibid.)

Diaz's statement that he had just arrived and his invitation to enter the apartment could reasonably have been construed as consent to enter by a co-tenant. There is no requirement that consent may be given only by the owner or leaseholder of the property. The presence of a large group of people in the apartment does not vitiate the reasonableness of the officers' belief in Diaz's appar

ent authority. The housing shortage in Santa Maria had made it commonplace for multiple tenants to occupy a single unity. Although Diaz did not have actual authority over the premises, the officers' reliance on his apparent authority to consent was reasonable. They were not required to determine if he possessed actual authority. Appellant's reliance on United States v. Shaibu (1990) 920 F.2d 1423 is misplaced. There, officers entered an apartment through an open door that had been left ajar. (Id. At pp. 1426-1427.) Here, the officers had an express invitation to enter.

Consent to Search Apartment

Appellant claims that he was under no obligation to resist, identify himself or respond to the officers, and that his silence could only have been construed as consent o search the apartment. "Consent searches are part of the standard investigatory techniques f law enforcement agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning. The police may seek to investigate further suspicious circumstances or to follow up on leads developed in questioning persons at the scene of a crime. These situations are a

far cry from the structured atmosphere of a trial, where assisted by counsel if he chooses, a defendant is informed of his trial rights." (Schneckloth v. Bustamonte (1973) 412 U.S. 218, 231-232 [Defendant's brother consented to search of defendant's car, aiding officers by opening the truck and glove compartment].)

The prosecution bears the burden of proving that consent was freely and voluntarily given. It is not, however, required to prove that a person knew of his right to consent. ." (Schneckloth v. Bustamonte, supra, (1973) 412 U.S. at pp. 222, 234.) The voluntariness of consent is a question of fact to be determined by the trail court based on the surrounding circumstances. (Id. At pp. 248-249.) The trial court's factual finding that a defendant voluntarily consented to a search must be upheld on appeal if supported by substantial evidence. (People v. James (1977), 19 Cal.3d 99,107).

Appellant did nothing to prevent the officers' entry, nor did he object once they were inside. His silence cannot be interpreted to mean that he withheld consent. Appellant voluntarily surrendered his privacy interest when he failed to object to the search. Substantial evidence supported the trial court's implied finding of consent.

Search of Wallet

Once inside the apartment, the officers the men that they

were investigating possible narcotics activity and asked if there was any objection to a search, Someone was seen putting his hand under a sofa cushion, and an officer reached in and pulled out a wallet. Appellant argues that the search of the wallet excluded the scope of the initial consent.

The scope of consent usually is defined by the expressed object of the search. (Florida v. Jimeno (1991) 500 U.S. 248, 251 [consent to search defendant's car extended to containers in the car which might contain drugs].) Where the search is reasonable, there is no requirement that the police must request separate permission to search each container in the area. (Id at pp. 251-252; People v. Jenkins, supra, 22 Cal.4th at p. 976.)

Here, an officer investigating possible narcotics activity observed a furtive hand movement under a sofa cushion. It was reasonable for him to suspect that this was an attempt to conceal the object for which he had received consent to search. We reject the People's argument that appellant has waived any objection t6o the search and seizure of the wallet by failing to raise it in his suppression motions. Both written motions specified appellant's objection to "any tangible evidence that was illegally seized from the defendant."

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

APPENDIX C-8

California Penal Code section 1538.5

(a) (1) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(A) The search or seizure without a warrant was unreasonable.

(B) The search or seizure with a warrant was unreasonable because any of the following apply:

(i) The warrant is insufficient on its face.

(ii) The property or evidence obtained is not that described in the warrant.

(iii) There was not probable cause for the issuance of the warrant.

(iv) The method of execution of the warrant violated federal or state constitutional standards.

(v) There was any other violation of federal or state constitutional standards.

(2) A motion pursuant to paragraph (1) shall be made in writing and accompanied by a memorandum of points and authorities and proof of service. The memorandum shall list the specific items of property or evidence sought to be returned or suppressed and shall set forth the factual basis and the legal authorities that demonstrate why the motion should be granted.

(b) When consistent with the procedures set forth in this section and subject to the provisions of Section 170 to 170.6, inclusive, of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

(c) Whenever a search or seizure motion is made in the municipal or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(d) If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section, Section 871.5, 1238, or 1466 are utilized by the people.

(e) If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section, Section 1238 or 1466, the property is not subject to lawful detention or if the time for initiating the proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section, Section 871.5 or 1238 are utilized; if they are utilized, the property shall be returned only if, after the conclusion of the proceedings, the property is no longer subject to lawful detention.

(f) (1) If the property or evidence relates to a felony offense initiated by a complaint, the motion shall be made in the superior court only upon filing of an information, except that the defendant may make the motion at the preliminary hearing in the municipal court or in the superior court in a county in which there is no municipal court, but the motion shall be restricted to evidence sought

to be introduced by the people at the preliminary hearing.

(2) The motion may be made at the preliminary examination only if at least five court days before the date set for the preliminary examination the defendant has filed and personally served on the people a written motion accompanied by a memorandum of points and authorities as required by paragraph (2) of subdivision (a). At the preliminary examination, the magistrate may grant the defendant a continuance for the purpose of filing the motion and serving the motion upon the people, at least five court days before resumption of the examination, upon a showing that the defendant or his or her attorney of record was not aware of the evidence or was not aware of the grounds for suppression before the preliminary examination.

(3) Any written response by the people to the motion described in paragraph (2) shall be filed with the court and personally served on the defendant or his or her attorney of record at least two court days prior to the hearing at which the motion is to be made.

(g) If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal

court or in the superior court in a county in which there is no municipal court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

(h) If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal or superior court.

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 court days after notice to the people, unless the people are willing to waive a portion of this time. Any written response by the people to the motion shall be filed with the court and personally served on the defendant or his or her attorney of record

at least two court days prior to the hearing, unless the defendant is willing to waive a portion of this time. If the offense was initiated by indictment or if the offense was initiated by complaint and no motion was made at the preliminary hearing, the defendant shall have the right to fully litigate the validity of a search or seizure on the basis of the evidence presented at a special hearing. If the motion was made at the preliminary hearing, unless otherwise agreed to by all parties, evidence presented at the special hearing shall be limited to the transcript of the preliminary hearing and to evidence that could not reasonably have been presented at the preliminary hearing, except that the people may recall witnesses who testified at the preliminary hearing. If the people object to the presentation of evidence at the special hearing on the grounds that the evidence could reasonably have been presented at the preliminary hearing, the defendant shall be entitled to an in camera hearing to determine that issue. The superior court shall base its ruling on all evidence presented at the special hearing and on the transcript of the preliminary hearing, and the findings of the magistrate shall be binding on the superior court as to evidence or property not affected by evidence presented at the special hearing.

After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to

trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his or her motion at the special hearing.

(j) If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding, except as limited by subdivision (p). In the alternative, the people may move to reinstate the complaint, or those parts of the complaint for which the defendant was not held to answer, pursuant to Section 871.5. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people, within 15 days after the preliminary hearing, request in the superior court a special

hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. The people may not request relitigation of the motion at a special hearing if the defendant's motion has been granted twice. If the defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why the evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court, prior to the time the review is sought, has dismissed the case pursuant to Section 1385. If the case has been dismissed pursuant to Section 1385, or if the people dismiss the case on their own motion after the special hearing, the people may file a new complaint or seek an indictment after the special hearing, and the ruling at the special hearing shall not be binding in any subsequent proceeding, except as limited by subdivision (p). If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in

the municipal court or superior court in a county in which there is no municipal court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which the municipal or superior court is located, in accordance with the California Rules of Court provisions governing appeals to the appellate division in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

(k) If the defendant's motion to return property or suppress evidence is granted and the case is dismissed pursuant to Section 1385, or the people appeal in a misdemeanor case pursuant to subdivision (j), the defendant shall be released pursuant to Section 1318 if he or she is in custody and not returned to custody unless the proceedings are resumed in the trial court and he or she is lawfully ordered by the court to be returned to custody.

If the defendant's motion to return property or suppress evidence is granted and the people file a petition for writ of mandate or prohibition pursuant to subdivision (o) or a notice of intention to file such a petition, the defendant shall be released pursuant to Section 1318, unless (1) he or she is charged with a capital offense in a case where

the proof is evident and the presumption great, or (2) he or she is charged with a noncapital offense defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1, and the court orders that the defendant be discharged from actual custody upon bail.

(l)If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of this state of the proceedings provided for in this section, Section 871.5, 1238, or 1466 and, except upon stipulation of the parties, pending the time for the initiation of these proceedings. Upon the termination of these proceedings, the defendant shall be brought to trial as provided by Section 1382, and, subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o), the defendant shall be entitled to have the action dismissed if he or she is not brought to trial within 30 days of the date of the order that is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when the dismissal is upon the court's own motion and is based upon an order at the special hearing granting the defendant's motion to return

property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he or she intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of the motion, he or she shall be entitled to bail as a matter of right, and, in the discretion of the trial or appellate court, may be released on his or her own recognizance pursuant to Section 1318. In case of an appeal by the defendant in a misdemeanor case from the denial of the motion, the trial court may, in its discretion, grant a stay of the trial pending disposition of the appeal.

'(m) The proceedings provided for in this section, and Sections 871.5, 995, 1238, and 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him or her. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that the judgment of conviction is predicated upon a plea of guilty. Review on appeal may be obtained

by the defendant provided that at some stage of the proceedings prior to conviction he or she has moved for the return of property or the suppression of the evidence.

(n) This section establishes only the procedure for suppression of evidence and return of property, and does not establish or alter any substantive ground for suppression of evidence or return of property. Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the United States and California Constitutions. Nothing in this section shall be construed as altering (1) the law of standing to raise the issue of an unreasonable search or seizure; (2) the law relating to the status of the person conducting the search or seizure; (3) the law relating to the burden of proof regarding the search or seizure; (4) the law relating to the reasonableness of a search or seizure regardless of any warrant that may have been utilized; or (5) the procedure and law relating to a motion made pursuant to Section 871.5 or 995, or the procedures that may be initiated after the granting or denial of such a motion.

(o) Within 30 days after a defendant's motion is granted

at a special hearing in the superior court in a felony case, the people may file a petition for writ of mandate or prohibition in the court of appeal, seeking appellate review of the ruling regarding the search or seizure motion. If the trial of a criminal case is set for a date that is less than 30 days from the granting of a defendant's motion at a special hearing in the superior court in a felony case, the people, if they have not filed such a petition and wish to preserve their right to file a petition, shall file in the superior court on or before the trial date or within 10 days after the special hearing, whichever occurs last, a notice of intention to file a petition and shall serve a copy of the notice upon the defendant.

(p) If a defendant's motion to return property or suppress evidence in a felony matter has been granted twice, the people may not file a new complaint or seek an indictment in order to relitigate the motion or relitigate the matter de novo at a special hearing in the superior court as otherwise provided by subdivision (j), unless the people discover additional evidence relating to the motion that was not reasonably discoverable at the time of the second suppression hearing. Relitigation of the motion shall be heard by the same judge who granted the motion at the first hearing if the judge is available.

(q) The amendments to this section enacted in the 1997 portion of the 1997-98 Regular Session of the Legislature shall apply to all criminal proceedings conducted on or after

January 1, 1998. [EFFECTIVE 1/1/2002. Amended September 4, 2001 (Bill Number: AB 1304) (Chapter 231).]